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No. 650.

IN THE

Supreme Court of the United States

OCTOBER, 1962 TERM.

ANTHONY CHUPKA, WILLIAM FREELY, WILLIAM McNALLY and CHARLES SCHLOSSER,

Appellants,

against

LORENZ-SCHNEIDER CO. INC. and JOHN STRAUSS, as President of INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 802,

Appellees.

IN THE MATTER OF THE ARBITRATION

between

WILLIAM FREELY, ANTHONY CHUPKA, WILLIAM McNALLY and CHARLES SCHLOSSER,

Appellants,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 802, and LORENZ-SCHNEIDER CO. INC.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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January 28, 1963.

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The Arbitration between WILLIAM FREELY, ANTHONY CHUPKA, WILLIAM McNALLY and CHARLES SCHLOSSER,

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Foreword.

Appellants' Statement as to Jurisdiction sets forth the basis of this Court's jurisdiction over this appeal, the statement of the case, and a statement of the questions

presented, and includes the opinions below and the statute involved.

A motion to dismiss or in the alternative to affirm the judgments appealed from has been filed by appellee Union.

Appellants contend that the questions raised by this appeal are substantial and of general public importance and merit full consideration by this Court and that the judgments of the New York Supreme Court should be reversed.

The descriptive terms, abbreviations and folio references used in the Jurisdictional Statement are used here.

Argument.

(a) Appellee's statement is not in accord with the record facts.

We regret to have to say that we are unable to accept appellee's statement of the facts as correct.

Appellee states (p. 8) the court below held that appellants were not without an adequate remedy. There was no such holding by any court. The majority of the Court of Appeals (the "State Court") in discussing appellants' supposed right to sue for damages states: "* * * [appellants'] remedy, *if any*, would have to be by way of a suit for damages * * *" (A-7, italics supplied).

Throughout its brief appellee uses language suggesting the existence of fact issues in this case and doubt as to whether the routes were actually sold to appellants, their good faith in purchasing the same and the *bona fides* of the sale transactions. There are no fact issues involved and there was never any issue as to any of these matters. In the arbitration, to which appellants were not parties, there was, as appellee conceded below, only one single issue. "[The] sole issue before the arbitrator was a question of

[contract] interpretation between the Employer and the Union" (p. 16, appellee's brief in the Court of Appeals; 664). In appellants' proceeding and action—with which this appeal is concerned—only legal issues are involved. "All movants [including appellee Union] assert that only a question of law is here presented and that there are no disputed fact issues requiring a trial." (C-1); "while no claim is made that [appellants] purchased these routes in bad faith * * *" (C-4). It is therefore clear that no fact issues are involved in this appeal.

At page 2, appellee quotes only part of a clause from the labor contract. The balance of that clause is found in footnote 4, page 10 of the Jurisdictional Statement. The quoted clause was not, as appellee suggests, the basis for the arbitrator's decision. To the contrary, the arbitrator was of the opinion that such clause authorized Company to sell its routes to *employees*, but he held, in conformity with appellee's contention, that such authorization was inapplicable to appellants because, although they were employees at the time, they ceased *eo instante* the sale transactions were concluded[1] to be employee's; hence appellants "* * * are *not* covered by the language of 17(a) any more than by any other language of the agreement" (594).

Other errors occur in appellee's statement. We consider it unnecessary to burden the Court with any further discussion on the subject. We shall rely instead upon the contrary assertions in appellants' statement of facts, the correctness of which appellee does not question.

(b) This Court's jurisdiction to entertain the appeal is not questioned.

Appellee does not challenge appellants' right to proceed by appeal nor the stated basis therefor. There is

[1] By such reasoning a man can never be said to have married a single woman.

therefore no question of this Court's jurisdiction to entertain the appeal.

(c) Appellee does not defend the holding of the State Court.

Significantly, appellee makes no effort to defend the basis upon which the State Court dismissed appellants' appeals. Appellee's brief does not even make a reference thereto. Obviously appellee recognizes that this ground—never urged by appellee and suggested for the first time by the State Court upon the argument—is indefensible.

The State Court relied upon its own decision in *Soto* as authority for its position. In that case arbitration was had on the issue of an employer's right to discharge its employees for conduct violative of the collective bargaining conditions, a deliberate slowdown. The employees were given notice of the arbitration and attended thereat with counsel of their own choosing to represent them. Upon the union's objection that it had the sole right to conduct the arbitration in behalf of the affected employees, the arbitrator adjourned the hearing. Prior to the adjourned date, the arbitrator notified the affected employees of his decision to permit the union, and not their own counsel, to represent them. As a result, the employees declined to attend the hearings although they were given time off by the employer for that purpose. After a determination adverse to them the affected employees sought and were denied leave to vacate the award. On appeal the Appellate Division reversed; that court was in turn reversed by the Court of Appeals. No constitutional questions were raised in that case. The rationale of *Soto*, as explained in the majority opinion of the State Court in this case, is that under a collective bargaining agreement the union represents all covered matters and each individual

employee in becoming a beneficiary of the contract gives up to the union, as his representative; his individual right to sue on or litigate as to the contract (A-8).

Apart from other fundamental differences between the two cases, appellee union in the case at bar, never, for obvious reasons, assumed to act as agent for appellants. On the contrary, appellee expressly disavowed agency and succeeded at arbitration on the contention that appellants were no longer members of the bargaining unit it represented and hence the Company could not avail itself of the clause of the labor contract which authorized the sale of routes to *employees*.

As appellants point out in their Jurisdictional Statement (pp. 26-27) it is for these reasons that appellee's experienced labor counsel never contended and do not now contend that appellee acted as agent for appellants at arbitration.

Absent such contention by appellee there is no doubt that the *Soto* holding is inapplicable and that the State Court decision is left without a valid basis to rest upon.

(d) Appellee's abandonment of its principal contentions in the state courts leaves the judgments appealed from without support.

Appellee has conceded that the arbitrator and the court implementing the award lacked jurisdiction to adjudicate as to or to affect the rights or property of appellants and that the Judgment is not binding upon or enforceable against appellants. Appellee has acknowledged that no citation of cases is necessary to emphasize the "sanctity of [the] principle * * * that every person is entitled to a 'day in court' before his rights may be affected" (26) but has heretofore argued that: (i) none of appellants' rights were adjudicated by the award or the Judgment;

and (ii) the award does not affect appellants' property (197); hence appellants had no ground for attacking the Judgment.

Appellee appears to have abandoned these contentions. Appellee's remaining contention—the transparently frivolous contention that appellants' efforts to restrain the enforcement against them of this void judgment, taken in flagrant disregard of their constitutional rights, constitute an impermissable collateral attack upon the judgment—and appellee's equally frivolous contentions that this appeal should be dismissed or affirmed, discussed *infra*, are all that appellee offers to support the judgments on appeal. These contentions, as we show, are wholly lacking in merit.

Contrary to appellee's contention (p. 16) the taking of proceedings in the action in which a judgment is rendered (to have the judgment vacated or reversed or modified, as was done by appellants in the arbitration proceeding, by appropriate proceedings in the trial or appellate court) is a direct, and not collateral, attack upon the judgment. *Restatement, Judgments*, §11.

So also, the taking of independent proceedings in equity to prevent the enforcement of the judgment (as was done by appellants in the action) is a "direct attack". *Restatement, Judgments*, §11.

So far as appellants are concerned the question of whether this is a direct or collateral attack is immaterial, for a void judgment may be called into question at any time by either a direct or collateral attack. *Matter of Doeg* v. *Howland Co.*, 224 N. Y. 30, 38; *Matter of Killian*, 172 N. Y. 547, 553; *Freeman, Law of Judgments*, 5th Ed. §334, §1202, p. 2497; 1 *Black on Judgments*, §260; *Restatement, Judgments*, §11F, §112, §117, *et seq.* It is therefore clear there is no merit whatever to appellee's remaining contention.

Appellee's failure to defend the State Court decision and the abandonment of appellee's own principal grounds of defense leaves the judgments on appeal without valid support.

(e) Appellee's brief fails to respond to or refute appellants' contentions.

Appellee does not address itself to or refute a single contention in appellants' Jurisdictional Statement. Nor does appellee question the applicability of or challenge any of the authorities cited in appellants' brief; of the forty-five cases and two authorities cited by us, appellee mentions only two, *Soto* and *Donato* v. *American Locomotive Co.*, 283 App. Div. 410, 127 N. Y. S. 2d 709, affirmed 306 N. Y. 96, 129 N. E. 2d 227; appellee fails to discuss or mention a single one of the cited cases decided by this Court.

Obviously, if appellants' contentions are correct, appellee is not entitled to a dismissal of this appeal. Appellee nevertheless seeks such dismissal without making the slightest effort to refute appellants' contentions. Instead, as we show in the next subdivision, appellee demolishes straw men.

(f) Appellee's motion to dismiss or affirm is addressed to phantom issues of its own manufacture.

Appellee's argument (pp. 9-20) avoids the issues of this case and addresses itself to phantom issues of its own manufacture. Although appellants' Jurisdictional Statement spells out appellants' contentions under the headings "The question presented by the appeal" (pp. 6-8), and "The federal questions are substantial" (pp. 26-28) precisely and in detail, appellee's argument is replete with such expressions as: "[appellants] might wish to argue * * *" (p. 13); "If it is the claim of [appellants]

* * *" (p. 13); "If [appellants] are here claiming * * *" (p. 14); and "* * * if [appellants] claim * * *" (p. 14).

In that fashion appellee avoids the real issues and introduces the straw men which it seeks to demolish. Except to divert attention from the true issues, we know of no purpose to be served by burdening the Court with an analysis of appellee's shadow boxing antics. We shall rely, instead, upon the Jurisdictional Statement which fully describes the issues involved and appellants' contentions.

Conclusion.

Appellants respectfully submit that the motion to dismiss or affirm should be denied and the case heard on briefs and oral argument.

New York City, January 28, 1963.

Respectfully submitted,

KALMAN I. NULMAN,
Attorney for Appellants.